

Statement of
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Committee on Government Reform
Subcommittee on the Federal Workforce and Agency Organization

“The Countdown to Completion: Implementing the New Department of Homeland Security Personnel System”

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Mr. Chairman. It is a privilege to appear before this subcommittee today to discuss the final regulations implementing the new human resource management system in the Department of Homeland Security (DHS). I am Ron James, Chief Human Capital Officer for the Department.

As the Congress recognized in creating the Department, we can't afford to fail in our mission to protect the country from terrorists and keep terrorists' weapons from entering the country. We need the ability to act swiftly and decisively in response to critical homeland security threats and other mission needs. To achieve this it is essential that we continue to attract and retain highly talented and motivated employees who are committed to excellence -- the most dedicated and skilled people our country has to offer. The current human resource system is too cumbersome to achieve this.

Almost a year ago, we issued proposed regulations for this new system -- and sought input from the public at large, our employees and their representatives, and members of Congress. The open comment period drew over 3,800 responses. After taking some time to examine those responses, we followed the Congressional direction in the Homeland Security Act to “meet and confer” with employee representatives. Following several pre-meetings with union leaders, we officially began the meet and confer process on June 14th and continued through August 6th. Meetings were conducted at and facilitated by the Federal Mediation and Conciliation Service and resulted in DHS' adoption of many proposals made by the employee representatives. There were, however, major areas where we could not resolve our differences in the meet and confer sessions. As a result, in early September, we invited the National Presidents of

NTEU and AFGE to meet with the Secretary and the Director of OPM to present their concerns. While these discussions further informed the development of the final regulations, there remain several areas where we have fundamental disagreement with union leadership on aspects of the new human resources system. We believe these issues, such as using performance rather than longevity as the basis for pay increases and providing for increased flexibilities to respond to mission-driven operational needs while balancing our collective bargaining obligations, go to the very core of what the Congress intended in granting DHS these flexibilities.

Through this collaborative process, we have continued to follow a set of guiding principles that were adopted from the outset of our design process. Those principles state that the Department of Homeland Security must ensure, first and foremost, that its human resource management system is mission-centered, is performance-focused, and is based on the principles of merit and fairness embodied in the statutory merit system principles. We believe that we have achieved that balance in our final regulations.

These final regulations have a strong correlation between performance and pay and greater consideration of local market conditions. There are three major changes to the current General Schedule pay structure. We are replacing the General Schedule with open pay ranges and have eliminated the “steps” in the current system, which are tied largely to longevity. We are changing how market conditions impact pay. Currently, all job types in a market receive the same increase. Under our new system, pay may be adjusted differently by job type in each market. Finally, we are creating performance pay pools where all employees who meet performance expectations will receive performance based increases.

The system will make meaningful distinctions in performance and hold employees accountable at all levels. Current systems, which provide a general across the board increase and rarely denied within-grade-increases, do little to encourage or reward excellence in the workforce. Similarly, absent a market-based system we have no basis to ensure DHS’ ability to compete for top talent for our important mission.

I know that movement to a pay-for-performance model is a big change for our employees and supervisors and there is a high level of internal/external interest in the more detailed aspects of how we plan to define and administer a pay-for-performance program at DHS. As a result of comments on the proposed regulations, and discussions during the meet and confer process we have made significant additions to the regulations to provide employees and their representatives a meaningful role in the design of further details in the pay-for-performance system – through a process of “continuing collaboration” in the development of implementing directives. In addition, we have created a Compensation Committee which will include representatives from the major DHS

labor organizations to address strategic compensation matters such as the annual allocation of funds between market and performance pay adjustments and the annual adjustment of rate ranges.

Additionally, during meet and confer, the labor organizations voiced strong concerns about the implementation schedule we proposed last year. Specifically, there were concerns that it did not allow adequate time to train managers and to evaluate system effectiveness. As a result of those concerns, we have significantly modified our schedule for implementing pay-for-performance. We will be introducing the new performance management system this fall, with extensive training over the summer months for all covered employees. New compensation programs, by contrast, will be phased in over the next 3 years, allowing ample time for training and program evaluation.

Approximately 8,000 DHS employees at Headquarters, Information Analysis and Infrastructure Protection, Science and Technology, Emergency Preparedness and Response, and the Federal Law Enforcement Training Center will be converted to our new pay systems in early 2006 and will not have their pay impacted by performance until early 2007 – some fifteen months after starting new performance management provisions. The balance of employees covered by these regulations will continue to see adjustments to their pay under the current GS system.

In 2007, another approximately 10,000 employees at the Secret Service and the Coast Guard will be converted to new compensation systems, with their first performance-based adjustments not occurring until 2008. Finally, in 2008, the remaining 66,000 employees – namely those in Customs and Border Protection, Immigration and Customs Enforcement, and Citizenship and Immigration Services will be converted from the General Schedule, with their first performance-based adjustments occurring in 2009.

Through this phased approach, the vast majority of DHS employees will have two to three full cycles under new performance management provisions prior to performance being used to distinguish levels of pay. This approach is prudent in ensuring that the organization has time to internalize key aspects of the new system and in ensuring that we have time to build greater employee understanding and confidence in how the compensation systems will be administered.

In addition to this change in the implementation schedule, at the request of the unions during meet and confer, we have provided a formal role for employees and their representatives in helping us to gauge whether the program is having the intended effects both in the short and long term. They will be asked to provide comments on the design and the results of the program evaluation.

Congress also granted us authority to modify the adverse actions and appeals procedures. We have streamlined the adverse action and appeals process while ensuring fairness and due process. We pledged at the beginning of this process to preserve fundamental merit principles, to prevent prohibited personnel practices, and to honor and promote veterans preference and we have honored that commitment. These are core values of public service, which we will not abandon.

We have retained the current definition of adverse actions, and have at the request of labor representatives retained the “efficiency of the service standard” for taking adverse actions. The minimum notice period has been shortened from 30 days in the current system to 15 days, but we have extended the minimum reply period from 7 days to 10 days. In addition, we have established one process for dealing with both performance and conduct issues in place of the separate processes under current title 5 provisions. These changes are needed to ensure that DHS supervisors are able to take administrative action when it is warranted. Standardized processes will make the appeals process easier to understand for those employees that are affected and to bring fair and efficient resolution for all parties. I am confident that the American public expects this level of accountability from the men and women that are charged with protecting our Homeland.

Additionally, we have created a category of offenses that have direct and substantial impact on the ability of the Department to protect homeland security. These offenses would be so egregious that supervisors have no choice but to recommend removal. Although we have not specified these offenses in the final regulations, we do suggest that accepting or soliciting a bribe that would compromise border security or willfully disclosing classified information are offenses that could reach this threshold. We would not propose to use this authority lightly or frequently and employees will know in advance the offenses that would warrant mandatory removal. Only the Secretary could identify these offenses, after consultation with the Department of Justice, and only the Secretary or his designee could mitigate the removal. Employees alleged to have committed these offenses will have the right to advance notice, an opportunity to respond, a written decision, and a further appeal to an independent DHS panel. At the request of DHS labor unions, we agreed that these offenses would be published in the Federal Register and made known annually to all employees.

The Merit Systems Protection Board will continue to hear the vast majority of our cases. Working with the Board, we have made significant procedural modifications to gain greater efficiency in decision-making and provide deference to our DHS mission. These modifications to MSPB procedures – including limited discovery, summary judgment, and expedited timelines – will further DHS mission without impairing fair treatment and due process protections. In

response to comments, we have adopted the “preponderance of evidence” standard for all adverse actions whether conduct or performance based. We also were persuaded by the DHS labor organizations to provide bargaining unit employees the option of grieving and arbitrating adverse actions – an option we had not included in the proposed regulations. Arbitrators and MSPB will use the same rules and standards governing such things as burden of proof and mitigation. In that regard, the Secretary and the Director were convinced by the labor organizations that our proposed bar on any mitigation should be modified – the final regulations provide for mitigation of a penalty only if the penalty is “so disproportionate to the offense as to be wholly without justification”.

On the labor management front, the final regulations on labor relations meet our operational needs while ensuring that employees may organize, bargain collectively, and participate through labor organizations of their own choosing in decisions, which affect them. One of the most significant changes from current law is the change to the DHS obligation to negotiate procedures and impact of the exercise of management rights.

In the face of a committed and unpredictable enemy, the Department must have the authority to move employees quickly when circumstances demand; it must be able to develop and rapidly deploy new technology to confront threats to national security; and it must be able to act without delay to properly secure the Nation’s borders and ports of entry. In the proposed regulations issued last year the Department was not required to bargain over the exercise of these rights nor over the procedures or impact. This was one of the primary issues raised by NTEU and AFGE both during intense discussions at meet and confer and in their meeting with the Secretary in early September. While they offered proposals to meet exceptional mission needs, those proposals did not go far enough. In today’s operational environment, the exceptional has become the rule. Our final regulations require that we confer – not negotiate – with labor unions over the procedures we will follow in taking management actions such as assignment of work or deployment of personnel. The final regulations also require bargaining over the adverse impact of management actions on employees when that impact is significant and substantial and the action is expected to exceed or has exceeded 60 days. Neither the confer process nor the obligation to bargain impact can delay our taking the action.

In addition, we have altered our proposed regulations to provide for mid-term bargaining over personnel policies, practices and matters affecting working conditions. The standard for triggering this obligation is that the changes must be foreseeable, substantial and significant in terms of impact and duration. The “substantial and significant” test is consistent with current FLRA and private sector case law. In response to additional union comments, we have provided for binding resolution of mid-term impasses by the Homeland Security Labor Relations Board. We made several other changes from the proposed regulations as a result of the meet and confer sessions, including restoring Weingarten rights

and reinstating the union's right to be present at formal discussions except when the purpose is to discuss operational matters.

In order to ensure that those who adjudicate the most critical labor disputes in the Department do so quickly and with an understanding and appreciation of the unique challenges that DHS faces, we have established the Homeland Security Labor Relations Board (HSLRB). In response to Union concerns, we have provided a formal opportunity for labor organization participation in the nomination process for Board members. Board members, who will be appointed by the Secretary, should be known for their integrity and impartiality as well as their expertise in labor relations, law enforcement, or national/homeland and other security matters. The HSLRB will have jurisdiction over disputes concerning the duty to bargain, the scope of bargaining, negotiation impasses, and exceptions to arbitration awards involving disputes over the exercise of management rights. We retain the FLRA for all other matters including bargaining unit determinations, union elections, individual employee Unfair Labor Practices, and resolving exceptions to other arbitration awards. The FLRA may also be called on to review the record of an HSLRB decision in order to gain access to judicial review of HSLRB decisions.

We recognize that these are significant changes. They are necessary for the Department to carry out its mission and will unlock the potential of DHS to retain, attract and reward some of the finest civilian employees serving our country today. These final regulations fulfill the requirements of the Homeland Security Act to create a 21st century human resource system that is flexible and contemporary while protecting fundamental employee rights. We have developed these regulations with extensive input from our employees and their representatives and we have listened and made changes as a result of their comments. We believe we have achieved the right balance required between core civil service principles and mission essential flexibility.

That concludes my remarks. I welcome any questions.